IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 4TH DECEMBER 2007 / 13TH AGRAHAYANA 1929

RSA.No. 925 of 2007()

AS.10/2004 of SUB COURT,NEYYATTINKARA
OS.187/2003 of PRINCIPAL MUNSIFF'S COURT, ,NEYYATTINKARA

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APPELLANT/APPELLANT/DEFENDANT:

MEERAN PILLAI ABDUL ASEES, AGED 47 YEARS
PROPRIETOR, PADMA DRY CLEANING,VISWANATHA BUILDING
BALARAMAPURAM FROM THENGUVILAKATHU VEEDU,
THALAYIL DESOM, ATHIYANNOOR VILLAGE (ACTUALLY THE
APPELLANT IS RESIDING AT RAJA SUNI,VADAKKAVILA,
BALARAMAPURAM P.O., PALLICHAL DESOM AND VILLAGE.

BY ADV. SRI.R.GOPAN

RESPONDENT: RESPONDENT/PLAINTIFF:

VISWANATHAN THANUMOORTHY,
AGED 63 YEARS, VISWANATHA BUILDING,ERATTATHERUVU,
BALARAMAPURAM, ATHIYANNOOR DESOM, KOTTUKAL VILLAGE

BY ADV. SRI.G.S.REGHUNATH

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 04/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M. Sasidharan Nambiar, J.

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R.S.A. No. 925 of 2007

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Dated this the 4th day of December, 2007

JUDGMENT

Defendant in O.S.No.187/2003 on the file of the Munsiff's Court, Neyyattinkara is the appellant. Plaintiff is the respondent. He instituted the suit seeking a decree for recovery of possession of the plaint schedule shop rooms. Admittedly, plaint schedule shop rooms were obtained by appellant on rent under Exts.A1 and A2 rent deeds dated 13-11-2000 and 13-3-2000. Period of lease provided both under Exts.A1 and A2 is 11 months from 13-11-2000 to 13-3-2001. The case of the respondent is that later rent was enhanced from Rs.405/- to Rs.620/-. Appellant defaulted to pay the rent from April, 2002 onwards. Under Ext.A3 notice respondent demanded surrender of possession of the plaint schedule shop rooms. Ext.A5 the original notice was returned unclaimed. Appellant did not surrender possession of the plaint schedule shop rooms . It is claimed that he is entitled to a decree for recovery of possession of the plaint schedule shop rooms. Appellant resisted the suit, admitting Exts.A1 and A2. contending that tenancy was not validly terminated as provided under section 106 of the Transfer of Property Act, hereinafter referred to as “the Act”, and he did not receive any notice and instead of sending notice in the correct address,

notice was sent at his earlier address and it is not a valid notice and therefore the respondent is not entitled to the relief sought for.

2. Admittedly, provisions of the Kerala Act 2 of 1965 is not applicable where the plaint schedule shop rooms are situated. Learned Munsiff on the evidence of PW1 and DW1 and Exts.A1 to A5 and B1 to B11(c) granted a decree holding that respondent is entitled to a decree for recovery of possession of the shop rooms with arrears of rent and damages. Appellant challenged the judgment before Sub Court, Neyyattinkara in A.S.No.10/2004. Learned Sub Judge on re-appreciation of the evidence confirmed the findings of the trial court and dismissed the appeal. It is challenged in this appeal.

3. Learned counsel appearing for the appellant and the learned counsel appearing for the respondent was heard.

4. The arguments of learned counsel for the appellant relying on a decision of this Court reported in Madhavan Vydiar V. Janaki (1973 KLT 490) is that as per Ext.A3, tenancy is not terminated and therefore it is not a valid notice as provided under section 106 of the Act. Learned counsel also argued that under Ext.A3 notice appellant was only directed to surrender possession of the plaint schedule shop rooms and tenancy was not terminated and without terminating the tenancy, recovery of possession

cannot be granted. It was also argued that Ext.A5 notice was returned with the endorsement "unclaimed" and as DW1 appellant proved that address shown in Ext.A5 is not the correct address of appellant as he had shifted the residence from the said house and respondent did not examine the Postman and by the evidence of DW1 presumption that the notice was served was rebutted and therefore findings are not sustainable. The learned counsel for the respondent pointed out that section 106 of the Act is applicable only if there is no contract to the contrary and Exts.A1 and A2 deeds contain a contract to contrary that when appellant defaulted payment of rent for one month, he is liable to surrender possession of the plaint schedule shop rooms on demand and therefore there is no necessity for a notice as provided under section 106 of the Act. It was also argued that there is no evidence to prove that appellant shifted his residence from the one shown in Ext.A5 and oral evidence of DW1 is insufficient to prove that fact. It was also argued that appellant did not intimate respondent about his change of residence and notice was sent in the correct address shown in Exts.A1 and A2 deeds and was returned unclaimed and therefore courts below rightly granted the decree.

5. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal. Exts.A1 and A2 establish that there

is a contract to the contrary as provided under section 106 of the Act. The contract provides for surrender of possession on demand, if the tenant commits default in payment of one month's rent. It is definitely a contract to the contrary. A similar question was considered by a Full Bench of this Court in Devaki V. Alavi (1979 KLT 67) and also by the Division Bench in Sidharthan V. Ramadasan (1984 KLT 538). It was held that it is a contract to the contrary as provided under section 106 and a statutory notice under section 106 of the Act was not necessary. If that be so, even if there is no notice terminating the tenancy, defence that Ext.A5 is not sent in the correct address is not a valid defence. Appellant is entitled to insist for a notice only by the provision of section 106 of the Act.

6. Though appellant raised a contention that he had shifted his residence and therefore Ext.A5 notice ought to have been sent in the correct address, trial court and first appellate court did not accept his case. Courts below found that evidence of DW1 with regard to the shifting of residence is contrary to the pleadings in the written statement as to when he shifted the residence. When in the written statement he contended that he shifted residence before the expiry of the period of lease provided under Exts.A1 and A2, evidence is to the contrary. Court below also found that no material is produced to substantiate the case that he shifted the residence. The court

below rightly accepted Ext.A5 as a valid notice. No other substantial question of law is involved in this appeal.

7. Learned counsel for the appellant then submitted that appellant may be granted six months time to surrender vacant possession of the plaint schedule shop rooms. Learned counsel for respondent opposed the prayer. As appellant has been conducting the business in the plaint shop rooms from 2000 on wards, he is granted three months' time to surrender vacant possession of the plaint schedule shop rooms on the following conditions:-

> "Appellant shall file an affidavit before the executing court within seven days from today unconditionally undertaking to surrender vacant possession of the plaint schedule shop rooms,on the expiry of three months from today. He shall also pay the arrears of rent and damages as found by courts below along with the affidavit. He shall also undertake to pay the future damages at the rate found by the court below till the end of three months."

The appeal is dismissed, accordingly.

M. Sasidharan Nambiar,
Judge.

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